

§ 1210.17

5 CFR Ch. II (1–1–08 Edition)

§ 1210.17 Settlement.

(a) *Settlement discussion.* Neither an adjudicating official nor the Board may require settlement discussions in connection with any action appealed under this section. If either party decides that settlement is not desirable, the matter will proceed to adjudication. The parties are not prohibited from engaging in settlement discussions on their own.

(b) *Settlement judges.* Where the parties agree to engage in settlement discussions, these discussions will be conducted by an official specifically designated by MSPB in each case for that sole purpose. That settlement discussions are being held by the settlement judge in no way alters the authority of the adjudicating official, who will continue to process all other aspects of the appeal.

§ 1210.18 Case suspension procedures; use of the Mediation Appeals Program; refiled appeals.

(a) The parties may submit a request for additional time. Requests for such case suspensions must be submitted jointly. Upon receipt of such request, an order suspending processing of the case for a period up to 30 days may be issued at the discretion of the adjudicating official. Suspension periods granted pursuant to this procedure shall not be included when determining whether an initial decision has been issued within the 90-day period specified in section 5 CFR 9701.706(k)(7) and § 1210.21(a) of this part.

(b) If the parties agree jointly to use the Board's Mediation Appeals Program (MAP), the period within which the parties participate in MAP shall not be included when determining whether an initial decision has been issued within the 90-day period specified in 5 CFR 9701.706(k)(7) and 1201.21(a).

(c) If an appeal is refiled after it has been dismissed without prejudice, the 90-day period specified in 5 CFR 9701.706(k)(7) and 1201.21(a) restarts on the date of refiling. For purposes of this paragraph, "refiled" has the same meaning as "filed" set out in § 1210.21(a).

§ 1210.19 Right to a hearing.

(a) An employee with a right of appeal under subparts F and G of 5 CFR part 9701 generally has a right to a hearing. When the adjudicating official finds that material facts are not in dispute, he or she must issue an initial decision without conducting a hearing, as appropriate. See 1210.20(e).

(b) Where the appellant requests a hearing and summary judgment is not appropriate, the adjudicating official may, in his or her discretion, hold the hearing in whole or in part by telephone, videoconference, or in person at the Board's regional or field office or at a designated hearing site listed at 5 CFR part 1201, Appendix III. Although the preferences of the parties and the nature of the issues to be heard and determined will inform the adjudicating official's decision, the ultimate selection rests in the sound judgment of the official. Among the factors that the adjudicating official will consider in deciding whether to hold a hearing in whole or in part by videoconference or telephone are:

(1) The costs of traveling to the hearing site as compared with the costs of traveling to a videoconferencing site;

(2) The distance the parties and their witnesses would have to travel to appear in person; and

(3) Whether appearance by videoconference or telephone of the appellant or his or her witnesses would unduly prejudice the appellant.

§ 1210.20 Summary judgment.

(a) *Motion by a party.* Any party may file a motion for summary judgment if the party believes that material facts are not in genuine dispute and that the party may be entitled to judgment as a matter of law. Each motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the moving party contends there is no genuine dispute. The statement shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury, or other evidence attached to the motion, relied on to support the statement.

(b) *Opposition to motion.* An opposition to a motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the party contends there exists a genuine dispute for hearing. The statement in opposition shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury or other evidence attached to the opposition, relied on to support the statement. The party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine dispute for hearing.

(c) *Time of filing.* Any party may file a motion for summary judgment no later than 5 days after the time limit for the completion of discovery set in the Board's acknowledgment order, or other time limit set by the adjudicating official. An opposition to a motion for summary judgment shall be filed within 15 days of service of the motion, or at the time specified by the adjudicating official.

(d) *Initiated by adjudicating official.* In addition to the authority set forth in 5 CFR 1201.41(b), if the adjudicating official determines on his or her own initiative that material facts may not be in genuine dispute, he or she may, after giving the parties written notice and at least 15 days to respond in writing, find that material facts are not in genuine dispute. The written notice to the parties shall include a statement separately listing all material facts as to which the adjudicating official believes there is no genuine dispute.

(e) *Decision by adjudicating official.* If, after considering the parties' submissions, the adjudicating official finds that material facts are not in genuine dispute, he or she must grant summary judgment on the law pursuant to 5 CFR 9701.706(k)(5) without conducting a hearing.

(f) *Definitions.* A fact is material if it is capable of affecting the outcome of the appeal. For a dispute to be genuine, there must be evidence sufficient for a reasonable person to find in favor of the nonmoving party.

§ 1210.21 Initial decision by the adjudicating official.

(a) *General.* The adjudicating official must issue a decision after the close of the record and a copy of the decision must be provided to each party to the appeal and to the Director. An initial decision must be issued no later than 90 days after the date on which the appeal is filed. However, failure to meet this deadline will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l). A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is the date on the Board's acknowledgment order, and the Board must issue an acknowledgment order within five calendar days after receiving the appeal. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. The date of filing by e-filing is the date of electronic submission.

(b) *Consideration of penalty.* The adjudicating official may modify the penalty imposed by the Department if he or she determines that such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the adjudicating official's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied.

(c) *Interim relief.* (1) If an employee is the prevailing party in an appeal under this subpart, the employee must be granted the relief provided in the decision upon issuance of the decision, subject to paragraph (b)(3) of this section. Such relief remains in effect pending the outcome of any petition for review unless—

(i) An adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department,